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IN THE

Supreme Court of the United States

.....Term, 196....

No. 468

JOHN A. PEKE
Petitioner,

v.

STATE OF NEW MEXICO
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF NEW MEXICO

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Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of New Mexico entered March 1, 1962, in the above entitled cause.

OPINION BELOW

The opinion of the Supreme Court of New Mexico is reported in 371 P. 2d (Adv. p. 226), and is reproduced in Appendix A. A rehearing was denied on May 17, 1962, and petitioner's motion for leave to file a second petition for rehearing was denied July 17, 1962, both without opinion.

JURISDICTION

The judgment of the Supreme Court of New Mexico was entered May 17, 1962. Jurisdiction of this Court is invoked under Title 28 United States Code, Section 1257 (3), petitioner having asserted in the court below rights, privileges and immunities conferred by the Constitution and Laws of the United States. By order of Mr. Justice White, August 4, 1962, time to file this petition was extended to and including October 1, 1962.

HOW THE FEDERAL QUESTIONS WERE PRESENTED AND DISPOSED OF

The constitutional issues presented by this petition for certiorari were not specifically called to the attention of the trial court, nor were they asserted or argued before the New Mexico supreme court upon the general appeal. The opinion of that court gives them no consideration. However, in his first petition for rehearing filed in the New Mexico court, petitioner asserted that his conviction for embezzlement came about in violation of the due process clause of the 14th Amendment to the Constitution of the United States. In addition, in that petition he argued that the sentence imposed upon him amounted to double jeopardy, likewise in violation of this constitutional provision. This petition for rehearing was denied by the New Mexico court without opinion. Thereafter, petitioner filed a motion for a leave to file a second petition for rehearing, together with his proposed second petition.

In his motion he urged upon the New Mexico court that it specifically rule on the constitutional question that had been presented by his first petition for rehearing, and further stated that the failure of the New Mexico court to so rule could be based on the failure of his counsel in the trial court to preserve his record. With this motion, petitioner filed a proposed second petition for rehearing in which he asserted that pursuant to the doctrine of fundamental error these constitutional questions merited the attention of the state supreme court. Petitioner's motion was denied without opinion, his second petition for rehearing falling with it.

Thus, at the outset, petitioner bluntly raises here the issue of the jurisdiction of this Court and seeks to have it resolved in his favor. It is his contention that, although the New Mexico court did not expressly rule upon petitioner's federal constitutional rights, it nevertheless so disposed of these allegations as to confer jurisdiction upon this Court. Actual determination by the state court of the federal question in terms is not required. *Lawrence v. State Tax Commission of Mississippi*, 286 U. S. 276; *Dorchy v. Kansas*, 272 U. S. 306; *Dewey v. Des Moines*, 173 U. S. 193. Moreover, the fact that a decision purports to rest upon state grounds does not preclude this Court from deciding whether federal constitutional rights were in fact denied. *N. A. A. C. P. v. Alabama* 357 U. S. 449; *Williams v. Georgia*, 349 U. S. 375; *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U. S. 673; *Davis v. Wechsler*, 263 U. S. 22; *Rogers v. Alabama*, 192 U. S. 226; *Silber v. United States*, 82 S. Ct. 1287; *Brown v. Mississippi*, 297 U. S. 278; *Blackburn v. Alabama*, 361 U. S. 199.

All the errors which are claimed in this petition were called to the attention of the court below. Its silence should not lead to a presumption that these errors were not "passed upon" in such a way as to close the gates of this Court to their consideration. New Mexico has repeatedly recognized the doctrine of funda-